



What is at stake here is the security and stability of that long-standing NLRB-certified, national, multi-employer bargaining unit. By purporting to carve the employees of AFP out of that multi-employer unit, the NLRB violated the explicit statutory mandate of NLRA Section 9(a), which dictates that the Union “... *shall be* the exclusive bargaining representative *of all the employees* in such unit for purposes of collective bargaining.”

And, as we also established, absent this Court taking action, Local 669 has no meaningful opportunity for judicial review of the Board’s action.

The NLRB’s opposition fails to rebut the Union’s showing that this Court has jurisdiction under *Leedom* to remedy the Board’s violation of the NLRA.

**A. The Material Facts of the Case Are Established**

The record establishes the following key and undisputed facts:

1. A national multi-employer bargaining unit was established by the NLRB’s secret ballot election among sprinkler fitter employers and formal certification of the result, on July 21, 1954, pursuant to Section 9(a) of the NLRA, and that Section 9(a) certified multi-employer bargaining unit continues to exist to this day. Complaint (Doc. 1), ¶ 6 and Exh. A; Def. Motion to Dismiss (Doc. 11) at 6; Pl. St. of Undisp. Facts (Doc. 13-1), ¶¶1, 2; Def. St. of Facts. (Doc. 20).
2. The NLRB’s 1954 certification expressly provides that Local 669 is the exclusive bargaining representative of “*all of the employees in such [multi-employer] unit for the purposes of collective bargaining ...*” Complaint, Exh. A (emphasis added).
3. On November 1, 2011, AFP entered into a settlement agreement with the NASI Funds pursuant to which, if it did not pay the full amount it owed to the Funds by March 31, 2013, AFP “agrees to designate, and does hereby designate, the National Fire Sprinkler Association to act on its behalf as representative in national collective bargaining for, and to be bound by any successor Collective Bargaining Agreement or Agreements with Road Sprinklers Fitters Local Union No. 669, U.A., AFL-CIO.” By choosing not to pay, by March 31, 2013, the full amount it owed, AFP voluntarily designated and elected to join the NLRB-certified Section 9(a) national multi-employer bargaining unit, and it has never even attempted to withdraw from that multi-employer unit at any time to the present date. As a constituent of the multi-employer unit, AFP adopted the NFSA Section 9(a) multi-employer collective bargaining agreements for their 2011-13

and 2013-16 terms and also the current 2016-21 agreement. Pl. St. of Undisp. Facts, ¶¶ 5, 6, 7; Def. St. of Facts.

4. In November of 2016, at the NLRB hearing below, AFP reaffirmed that it remained within the Section 9(a) NFSA multi-employer bargaining unit at that time. Pl. St. of Undisp. Facts, ¶ 12; Comp., Exh. D.
5. At all times during this proceeding, and without exception, the Union objected to the NLRB's conduct of a decertification election in a non-existent single-employer unit composed of AFP employees, and to the Board's failure to recognize and acknowledge AFP's undisputed membership in the NFSA multi-employer unit, and that any purported single employer AFP bargaining unit had ceased to exist as of AFP's election to join the national multi-employer unit. Pl. St. of Undisp. Facts, ¶ 11; Def. St. of Facts, ¶ 11.<sup>1</sup>

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<sup>1</sup> Defendant's surprising contention that the Union stipulated to the propriety of an election in an AFP single employer unit before the NLRB below is fictitious as well as irrelevant. At all material times before the NLRB the Union continuously and strenuously *objected* to any election in a non-existent *single* employer bargaining unit. *See* Exh. A hereto (Union Statement of Position (11/11/16); Exh. B (Union Request for Expedited Review of the Regional Director's Decision (1/17/17) at 2-4); Exh. C (Union Supp. Submission in Support of Request for Review (2/14/17) at 1-2). **As the Regional Director's Decision and Order stated: "The Union asserts that the single employer unit sought by the Petitioner does not exist." Exh. E to Complaint (RD Decision) at 2.** The stipulation referenced by Defendant related to the composition of the unit (i.e., as including sprinkler fitters and excluding clericals, etc.). **Moreover, the stipulation was not relied upon as the legal basis for either the Regional Director's decision or the Board's denial of the Union's request for review. The Regional Director did make reference to the stipulation at footnote 2 of his decision, in which he described it as derived from the Local 669/NFSA national *multi-employer* agreement. Exh. E (RD Decision) at 2, n. 2. But the Regional Director's actual decision does not rely upon the unit stipulation referenced in footnote 2, or even cite to it. Exh. E (RD Decision) at 3-7. Instead, the Regional Director based the decision to proceed with a single-employer unit election on the basis that the Union never enjoyed a Section 9(a) status vis-a-vis AFP because of the language in the parties' 2005 agreement. *Id.* And the Board adopted the Regional Director's decision relying upon the same language of the 2005 agreement and not on the basis of any stipulation. Exh. F to Complaint (NLRB Order) at fn. 1.** This attempt by Defendant's counsel to **construct a supplemental legal basis** for the Board's decision below is therefore a *post hoc* rationalization and unavailing as a matter of law. *Hearth, Patio and Barbecue Ass'n v. United States D.O.L.*, 706 F.3d 499, 509 (D.C. Cir. 2014) (citing *Local 814, Teamsters v. NLRB*, 546 F.2d 989, 992 (D.C. Cir. 1976)). Counsel's *post hoc* rationalization may also be indicative of counsel's recognition of the need for a re-write of the Board's decision below.

**B. The Board's Inapposite and Fallacious Section 8(f) Argument**

The NLRB has invested the greater part of its opposition in repeating the same inapposite and erroneous legal argument that the Board relied on below: that the parties' original Section 9(a) recognition agreement, entered into back in 2005, established a bargaining relationship governed by NLRA Section 8(f) not by NLRA Section 9(a). NLRB Decision at 1, n.1; Def's Opp. and Reply (Doc. 20) at 6-10.

While there have been a number of NLRB decisions addressing Local 669 Section 9(a) recognition agreements over the years,<sup>2</sup> it is undisputed and therefore settled for purposes of this case, that the NLRB-certified Section 9(a) national multi-employer unit that AFP voluntarily joined pursuant to the 2011 agreement, and from which it has never even attempted to withdraw, is governed by NLRA Section 9(a) and *not* NLRA Section 8(f). Pl. St. of Undisp. Facts, ¶¶ 1, 2; Def. Mot. to Dismiss at 6. The NLRB's legal arguments to the contrary are clearly erroneous.<sup>3</sup>

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<sup>2</sup> In seven (7) reported decisions, the NLRB has affirmed the validity of Local 669 NLRA Section 9(a) recognition agreements: *Colo. Fire Sprinkler, Inc.*, 364 NLRB No. 55 (2016); *Kings Fire Protection, Inc.*, 362 NLRB No. 129 (2015); *Triple A Fire Prot.*, 312 NLRB 1088, 1088 (1993), *enf'd*, 136 F.3d 727 (11<sup>th</sup> Cir. 1998), *cert. denied*, 525 U.S. 1067 (1999); *MFP Fire Prot.*, 318 NLRB 840, 842 (1995), *enf'd*, 101 F.3d 1341 (10<sup>th</sup> Cir. 1996); *Am. Automatic Sprinkler Sys., Inc.*, 323 NLRB 920, 920-21 (1997), *enf'ment den. in part*, 163 F.3d 209 (4<sup>th</sup> Cir. 1998), *cert. denied*, 528 U.S. 821 (1999); *Dominion Sprinkler Servs.*, 319 NLRB 624, 625 (1995); *Excel Fire Prot.*, 308 NLRB 341, 343 (1992). In two (2) cases, the NLRB has ruled that Local 669 recognition agreements, although explicitly citing NLRA Section 9(a) as their legal basis, merely established revocable NLRA Section 8(f) relationships. *Austin Fire Equipment*, 359 NLRB No. 3 (2012), *pet. denied*, 637 F. App'x. 613 (D.C. Cir. 2016) (unpublished); *U.S.A. Fire Protection*, 358 NLRB No. 162 (2012), *pet. denied*, 637 F. App'x. 611 (D.C. Cir. 2016) (unpublished). As the NLRB has conceded here, however, the only unit that existed at the time of the decision in this case was the multi-employer bargaining unit, which included AFP, and which was *certified* by the NLRB pursuant to NLRA Section 9(a). Pl. St. of Undisp. Facts, ¶¶ 1, 2; Def. Motion to Dismiss at 6; Def. St. of Undisp. Facts.

<sup>3</sup> The Board's reliance upon *Comtel Systems Technology Inc.*, 305 NLRB 287 (1991) is misplaced as its counsel must be aware. Defs. Opp. and Reply at 9-10. While it is true that a construction industry employer who joins a Section 9(a) multi-employer unit can thereafter contest the union's status as the Section 9(a) representative of its employees on a single

Defendant NLRB does not dispute that a construction industry union is entitled to establish Section 9(a) bargaining relationships in the same manner and on the same terms as any other labor union. *Allied Mech. Serv. v. NLRB*, 668 F. 3d 758, 765-66 (D.C. Cir. 2012) (citing *M&M Backhoe Serv., Inc. v. NLRB*, 469 F.3d 1047, 1050 (D.C. Cir. 2006)). “Indeed, the Board has made it clear that ‘unions [do not] have less favored status with respect to construction industry employers than they possess with respect to those outside the construction industry.’” *Id.* (citing *John Deklewa & Sons, Inc.*, 282 N.L.R.B. 1375, 1387 n.53 (1987), *enforced sub nom. Int’l Ass’n of Bridge, Structural & Ornamental Iron Workers, Local 3 v. NLRB*, 843 F.2d 770 (3<sup>rd</sup> Cir. 1988)).

And, as Defendant has conceded, it was undisputed below that Local 669 did precisely that by petitioning the NLRB to conduct a national secret ballot election for a multi-employer bargaining unit in 1954 and thereby obtaining the NLRB’s Section 9(a) certification as the exclusive bargaining representative of all of the employees in that unit – which includes the employees of AFP based on AFP’s voluntary decision to join that unit. Complaint, Exh. A; Pl. St. of Undisp. Facts, ¶¶ 1, 2; Def. St. of Facts (not disputing ¶¶ 1,2).

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employer basis, such “a challenge to majority status can only be made within a reasonable time” thereafter. *Casale Indus., Inc.*, 311 NLRB 951, 952-53 (1993) (citing *Comtel*). A “reasonable time” is defined by the NLRB as six months. *Id.*, 311 NLRB at 953 (rejecting employer’s untimely challenge to construction industry Section 9(a) multi-employer recognition). AFP could have challenged the Union’s NLRA Section 9(a) status within six months of joining the multi-employer unit but never did so. Or AFP could have voluntarily withdrawn from the NFSA multi-employer bargaining unit before the commencement of bargaining for either the 2013 or 2016 national agreements. *E.g.*, *Resort Nursing Home v. NLRB*, 389 F.3d 1262, 1265 (D.C. Cir. 2004) (citing *Retail Associates, Inc.*, 120 NLRB 388, 395 (1958)). But it is undisputed that no such timely objection or attempt to withdraw ever occurred, and that, as AFP conceded below, it remained within the multi-employer unit at the time of the single employer unit election ordered by the Board. Pl. St. of Undisp. Facts, ¶ 17; Def. St. of Undisp. Facts.

Thus, the NLRB's Section 9(a) certification of the NFSA multi-employer bargaining unit is undisputed; as is the Union's statutory status as the NLRA Section 9(a) exclusive bargaining representative of *all the employees* in that multi-employer unit; as is AFP's membership in that multi-employer unit at all material times; as is the NLRB's *violation of* the plain and mandatory statutory language in NLRA Section 9(a) that Local 669 is the exclusive bargaining representative "of *all* the employees" in that multi-employer unit.

**C. The Board Is Subject to and Must Comply With the Clear Mandate of NLRA Section 9(a)**

In addition to rehashing the argument discussed above, the NLRB offers the startling (to say the least) assertion that the Board is above the law that created and governs it. NLRA Section 9(a) is explicit in mandating that

Representatives . . . selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, *shall be* the exclusive representatives *of all the employees in such unit* for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. (Emphasis added).

The NLRB has not and cannot cite any legal authority for the proposition that the foregoing statutory language is merely elective, optional, or discretionary.

To restate the undisputed facts: Local 669 was "selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes;" the unit "appropriate for such purposes" is the national NFSA multi-employer unit; following that election, the NLRB certified that Local 669 "shall be" the exclusive representative "of all the employees in [the national NFSA multi-employer unit] for the purposes of collective bargaining," pursuant to the statutory mandate of NLRA Section 9(a); and the NFSA multi-employer unit specifically includes the employees of AFP by virtue of AFP's continuing

commitment to be part of that unit to the present day. Pl. St. of Undisp. Facts, ¶¶1, 5; Def. Mot. to Dismiss, 6-7.

Nevertheless, Defendant contends that the plain terms of NLRA Section 9(a) are not mandatory after all and place no statutory obligation on the Board to adhere to them by treating Local 669 as “the exclusive bargaining representative of *all* the employees in such unit.” Instead, it is argued, the NLRB was free to simply ignore the statutory language of Section 9(a)’s mandate and to treat Local 669 as if it were *not* the representative of *all* the employees in the multi-employer unit (by removing employees employed by AFP from that unit). NLRB Opp. and Reply (Doc. 20) at 3-5. The Board’s assertion in this regard is truly remarkable; it is also contrary to the settled rules of statutory construction.

If the Board were not obligated to treat Section 9(a) representatives as Section 9(a) representatives – that is, treat such representatives as “exclusive representatives of *all the employees*” in the certified multi-employer unit – Section 9(a) would be rendered essentially meaningless and a nullity. The Board’s interpretation must therefore be rejected. *Halverson v. Slater*, 129 F.3d 180, 185 (D.C. Cir. 1997) (rejecting interpretation of statutory provision that deprived provision of independent meaning); *RCA Global Communications Inc. v. FCC*, 758 F.2d 722, 733 (D.C. Cir. 1985) (an interpretation of a statutory provision that “would deprive it of all substantive effect [is] a result self evidently contrary to Congress’ intent.”).<sup>4</sup>

Nor does the NLRB’s citation to *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946), provide any support to the Board’s position. *A.J. Tower* held that, when it is operating within the

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<sup>4</sup> Defendant’s claim that this is the first time that NLRA Section 9(a) has been the basis for a *Leedom* lawsuit (NLRB Opp. and Reply at 5), may be true, but this is a distinction without a difference. Both this case and *Leedom* arose under the same statutory provision, NLRA Section 9 (Sections 9(a) and 9(b) respectively), and the operative term of both subsections of Section 9 (“shall”) is mandatory and *not* optional.

confines of the statutory obligations of NLRA Section 9(a), the Board has broad but not unlimited discretion regarding representation issues. *Cf. NLRB v. Fin. Inst. Employees*, 475 US 192, 201-06 (1986) (rejecting NLRB’s discretionary determination, *within* the statutory framework of Section 9(a), where the Board’s determination would disrupt stable bargaining relationships.).

But this case is not about the NLRB’s discretionary exercise of authority to ensure fair elections. It is about the NLRB’s refusal to comply with NLRA Section 9(a) itself, and its mandate that a union selected in such an election and certified by the Board as the multiemployer unit’s representative “shall be the exclusive representatives *of all the employees*” in that multiemployer unit. Nothing in *A.J. Tower* – nor more importantly in the NLRA itself – gives the Board authority to carve up an existing, properly-certified bargaining unit in order to deny Local 669 its statutory right to represent that existing NLRA-certified unit as a whole.

**D. No Meaningful or Adequate Review of the Board’s Action Is Available**

The NLRB’s assertion that Local 669 “enjoys a meaningful and adequate means of obtaining judicial review” is premised on its contention that judicial review is available to Local 669 because, in its view, Local 669 should engage in illegal picketing in the hope of thereby precipitating an unfair labor practice charge from AFP that might then proceed to a final and appealable Board order. NLRB Opp. and Reply at 11. The Board is wholly mistaken.

The Board’s contrived assertion that the Union should resort to illegal conduct is hardly a sure path to judicial review: even were the Union to engage in the illegal activity that the Board urges on it, AFP could choose *not* to cooperate by filing an unfair labor practice charge in response, and there would be no NLRB unfair labor practice proceeding and,

therefore, no final Board order that Local 669 could challenge at the Court of Appeals. In order for the Union to have an assured and adequate means of review under *Leedom*, the available review must be within the Union's control. *See, e.g., Electrical Workers v. NLRB*, 1968 U.S. Dist. LEXIS 8513, at \*7 (D.D.C. 1968) (granting summary judgment to Union pursuant to *Leedom* where Union had "no method *within its control* to litigate under the judicial review provisions of the Act" the lawfulness of the Board's action) (emphasis added).

Here, the Union has no alternative remedy, other than unlawful picketing, and even then the Union would not control whether an unfair labor practice charge would eventually be processed by the Board; that is solely within the control of our adversaries herein: AFP and the Board.

**E. Conclusion**

The NLRB's decision here threatens the continued existence of an NLRB-certified national multi-employer bargaining unit as it has existed since 1954. As shown above, Defendant's legal arguments and *post hoc* rationalizations in an attempt to justify the NLRB's decision are consistently in error. But the Board's erroneous legal arguments are not sufficient to establish this Court's jurisdiction under *Leedom v. Kyne*; what *does* establish the Court's jurisdiction is the NLRB's violation of the express, mandatory requirements of NLRA Section 9(a) which Defendant's counsel has unsuccessfully sought to rationalize or defend.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 23, 2018, I caused the foregoing (Corrected) Reply by Local 669 in Support of Summary Judgment to be filed by Electronic Case Filing (ECF) with the U.S. District Court for the District of Columbia. This system caused an electronic notification and link to be sent to the following:

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